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No. 78-279

In the Supreme Court of the United States

OCTOBER TERM, 1978

CHARLES J. PILUSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not reported. Its earlier opinion on direct appeal is reported at 511 F.2d 953.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-4a) was entered on June 28, 1978, and a peti-

tion for rehearing (Pet. App. 5a) was denied on July 21, 1971. The petition for a writ of certiorari was filed on August 18, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether travel in interstate commerce with intent to bribe an officer of a federally-insured bank, and bribery of that officer, constitutes a violation of the Travel Act, 18 U.S.C. 1952.

2. Whether the Travel Act is unconstitutionally vague because the court below and the Second Circuit differ as to the interpretation of the term "bribery" appearing in the Act.

STATEMENT

In 1974 petitioner was convicted by a jury in the United States District Court for the Eastern District of Virginia on one count of conspiracy, 18 U.S.C. 371, and two substantive counts of violating the Travel Act, 18 U.S.C. 1952, for travelling from Virginia to New York with the intent to bribe an officer of a federally-insured bank in violation of 18 U.S.C. 215 and New York Penal Law § 180.00 (McKinney 1975). He was sentenced to concurrent terms of two years' imprisonment. The court of appeals affirmed, 511 F.2d 953, and this Court denied certiorari, 423 U.S. 874. The district court thereafter denied petitioner's motion to vacate his conviction pursuant to 28 U.S.C. 2255,[1] and the court of appeals again affirmed (Pet. App. 1a-4a).

The facts are not disputed. Petitioner and his co-defendant Louis Pomponio were in the business of building and operating office and apartment buildings in Northern Virginia and the District of Columbia. Beginning in 1965 and continuing into 1972, their organization obtained construction loans in excess of $93 million through the Royal National Bank in New York City. During this time span, petitioner and Pomponio gave the senior vice-president of the bank, Sidney Zneimer, cash and gifts (including two automobiles) worth more than $320,000. In return for these payments, Zneimer helped them obtain construction loans, authorized advances that were not based upon the approval of bank inspectors, and approved substantial overdrafts on accounts maintained by their organization. Petitioner, an attorney, established a corporation, Real Equity Consultants, to receive the payments for Zneimer and thereby to conceal them (Tr. 280-287, 293, 373-374, 494-496).

ARGUMENT

1. In this collateral attack on his convictions, petitioner contends (Pet. 9-17) that commercial bribery is not an "unlawful activity" prohibited by the Travel Act and asks this Court to grant certiorari to review the purported conflict in interpreting the Act

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[1] Petitioner was on parole at the time this motion was filed. He has now completed his sentence.

between the Fourth Circuit here and the Second Circuit in *United States* v. *Brecht*, 540 F.2d 45 (1976). Petitioner's arguments are essentially the same as those raised in his prior petition for certiorari, which this Court denied (423 U.S. 874) before *Brecht* was decided by the Second Circuit. The purported conflict between the Second and Fourth Circuits was, however, previously raised in this Court by petitioner's co-defendant, Louis Pomponio, and certiorari was again denied (430 U.S. 966). Nothing has happened since the denial of certiorari in *Pomponio* that justifies review at the present time in connection with petitioner's collateral attack on the convictions based on his and Pomponio's bribery activities.

This case does not present a genuine conflict with *United States* v. *Brecht*, *supra*. The reversed conviction in *Brecht* was based solely on the New York commercial bribery statute, which the Second Circuit concluded was not within the term "bribery" used in Section 1952(b). Petitioner's conviction, on the other hand, was also a result of his violations of the federal bribery statute, 18 U.S.C. 215. Under that provision it is a crime for an officer, director, or employee of a federally insured bank, except as provided by law, to receive any "fee, commission, gift, or thing of value" from any person in exchange for procuring or attempting to procure a loan. Zneimer was an officer of a federally insured bank and personally received in his New York office more than $320,000 from petitioner and his co-conspirators.

Zneimer subsequently pleaded guilty to a federal indictment in connection with those payments.

Petitioner and his co-conspirators thus made payments whose receipt by Zniemer violated 18 U.S.C. 215, whether or not the New York commercial bribery law was violated by the payments. By aiding and abetting Zneimer's offense, they were guilty as principals. Travel in interstate commerce to make those payments was thus in every sense travel to "promote, manage, establish, carry on" or to "facilitate the promotion" of bribery "in violation of the laws of * * * the United States."[2] This basis for conviction was not involved in *Brecht*, which refused to apply the Travel Act to a course of conduct that the court regarded as being in the category of "relatively minor state offenses" that would not justify "a substantial extension of federal police resources." 540 F.2d at 49. It thus cannot be said that the Second Circuit would have reversed petitioner's convictions under the Travel Act.

Petitioner's argument that violations of 18 U.S.C. 215 are not covered by the Travel Act (Pet. 21)

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[2] Each count of the indictment charged petitioner with travel with intent to promote bribery in violation of both 18 U.S.C. 215 and New York law. See 511 F.2d 955. The evidence could not reasonably be viewed as showing a violation of the New York statute but not the federal. Either the money paid to Zneimer was an improper payment to procure commercial loans or it was not. The jury found that it was. This case is thus unlike *Leary* v. *United States*, 395 U.S. 6, 31-32 (1969), where different evidence underlay the separate grounds for conviction.

fares no better. Petitioner can draw no support for this contention from *Brecht*, which did not involve Section 215, and petitioner cites no authority for his construction of the statute. Since Congress, by the enactment of Section 215 has prohibited the acceptance of a bribe by an officer of a federally-insured bank, it is most reasonable to conclude that it intended to include such bribes in the Travel Act's proscription of interstate travel to facilitate the promotion of "bribery * * * in violation of the laws * * * of the United States." The term bribery is properly given its "generic" meaning, and is not subject to strict "common law" limitations that would confine it to corrupt conduct involving government officials. See *United States* v. *Nardello*, 393 U.S. 286, 292-296 (1969): "The language of the Travel Act * * * includes private persons as well as public officials." See also *United States* v. *Perrin*, 580 F.2d 730, 733-734 (5th Cir. 1978).

2. Petitioner also argues (Pet. 10-15) that the Travel Act is unconstitutionally vague, relying upon *Brecht's* holding that commercial bribery forbidden by state law is beyond the scope of the Act. Petitioner asserts (Pet. 10) that there was no precedent in 1971 that "remotely suggested" that his conduct could be deemed a violation of the Travel Act. But the literal text of the statute, as noted above, applied directly to petitioner's facilitation of the bribery of an officer of a federally insured bank, and any person engaged in a scheme to corrupt such an officer could be under no illusions as to the innocence of his

conduct. See also *United States* v. *Culbert*, No. 77-142 (March 28, 1978), slip op. 8-9. Moreover, this Court's decision in *United States* v. *Nardello*, *supra*, 393 U.S. at 293-296, confirmed as early as 1969 that the Travel Act would not be given "an unnaturally narrow reading" of the kind that petitioner advocates here.[3] The decision in the *Brecht* case, of course, was not handed down until after petitioner had violated the Travel Act and could not have misled him into thinking that his conduct was beyond federal regulation

3. The gist of petitioner's argument is that the Fourth Circuit's interpretation of the Travel Act was erroneous. There is no warrant for permitting petitioner to continue to litigate this question, which was raised and decided adversely to him on direct appeal, and which this Court declined to review by certiorari. There has been no "change in the law" in the Circuit where petitioner was convicted, as in *Davis* v. *United States*, 417 U.S. 333 (1974); see also *id.* at 361 (Rehnquist, J., dissenting). The differing approach of the Second Circuit to the applica-

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[3] As this Court pointed out in *Rose* v. *Locke*, 423 U.S. 48, 50 (1975): "All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden." Had petitioner consulted the law before acting, he surely would have had "fair warning" that his conduct was illegal. *Marks* v. *United States*, 430 U.S. 188 (1977), and *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), do not assist petitioner. Those cases merely disapprove retroactive applications of the law that cannot be forseen at the time of the alleged offense.

tion of the Travel Act to state law offenses has not resulted in a "complete miscarriage of justice" and does not present "exceptional circumstances that justify collateral relief." 417 U.S. at 346-347; see also *Stone* v. *Powell*, 428 U.S. 465, 477 n.10 (1976). Petitioner has already served his sentence, his parole term having expired. The possibility that an attorney who has engaged in a massive and obviously illegal bribery scheme may be subject to disbarment in New York does not constitute a miscarriage of justice necessitating review by this Court in a collateral proceeding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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